

You Say Tomato, I Say Tomahto: Diverse Approaches to E-discovery

*By Lauren A. Allen and Bryan Dawson**

As in-house counsel know all too well, wrestling with e-discovery demands is an ongoing challenge. It used to be that discovery consisted of paper files in boxes--now, discoverable materials can include emails, faxes, instant messages, text messages and voicemails. No one sends hard-copy memos anymore; instead, information flows between employees, contractors, vendors, suppliers and customers, and any of that may be potentially discoverable in a lawsuit. While evolving case law and the amended Federal Rules of Civil Procedure have offered some clarity to in-house counsel dealing with e-discovery, it has not helped reduce the sheer amount of data that may be subject to e-discovery, the number of potential custodians who may have responsive data and the timeframes in which organizations have to conduct discovery.

When it comes to e-discovery, organizations can take several different approaches. Some acquire the necessary tools and staff and do as much as possible in-house, while others outsource wherever possible. Both of these methods are valid, so when deciding which approach to take, in-house counsel should carefully consider a number of factors, including the organization's culture, e-discovery expertise, Information Technology resources, specific objectives and the frequency and types of litigation.

DEFINING YOUR E-DISCOVERY NEEDS

First, in-house counsel should carefully review the amount and type of litigations and enforcement actions their organizations can anticipate. Is the litigation generally defensive in nature, or does your company typically initiate lawsuits? Do you have frequent litigation, or are major lawsuits few and far between? Do your lawsuits tend to be similar, such as slip-and-falls, or do they vary widely? Are you in a heavily regulated industry and likely to come under scrutiny by government agencies?

Available and future resources are another consideration. In the current economy, it may be easier for some in-house counsel to add staff to manage e-discovery, while other organizations may find it more palatable to outsource e-discovery functions rather than buy new technology and increase internal headcount.

ACQUIRING THE DATA YOU NEED

Once in-house counsel have gotten a handle on their litigation types and trends, it's important to consider the demands of e-discovery on their specific organizations. In-house counsel should take into account the amount of data their employees produce, receive and send. Employees at a manufacturing company who work on a production line will not create nearly as much potentially responsive data as employees at a high-tech company who receive corporate personal digital assistants and laptops.

Before deciding whether to manage e-discovery internally or outsource it, in-house counsel should be able to inventory the types and amount of data that reside in the organization, where that data resides, when the data is scheduled to be deleted and how it can be preserved for litigation. If no one in the legal department knows, you need to find the people in the company who do know. Once these questions have been answered, it is time to decide whether to manage e-discovery in-house or outsource to a contractor.

INTERNALLY MEETING E-DISCOVERY NEEDS

There are several advantages to managing the entire e-discovery process in-house. The strategic aspect is an extremely important one--even when an organization has a very good relationship with contractors, no one outside the company will possess the same knowledge and understanding of the culture, the key players and the systems.

There is less education involved. An in-house staff member will know many of the important players without needing to consult an org chart. They also have a better grasp of what potential custodians, IT staff and attorneys are used to and comfortable with. This type of knowledge can help demystify the e-discovery process and allow for an e-discovery process that is as painless as possible.

Those who are in-house will also have a better understanding of the company's short- and long-term goals with each case. They will more instinctively grasp whether the costs and effort involved with e-discovery are worthwhile or if the case should be settled early on. At the other end of the spectrum, they will also have more insight into whether a matter is a bet-the-company litigation and all available resources should be invested in winning the case.

OUTSOURCING E-DISCOVERY MATTERS

Despite these advantages, there are many situations where an outside contractor is the better choice. If a company's litigation ebbs and flows, a contractor can quickly ramp up staff for e-discovery work when necessary. When there is less work, a contractor can easily staff fewer people with the organization. In the current economy, no legal department can justify idle staff who sit around wait for the next big lawsuit to be filed.

Since contractors focus solely on e-discovery, they also bring a specialized expertise that is difficult for many organizations to maintain in-house. They are also up-to-date on cutting-edge technology and the newest trends in case law.

Contractors also bring an impartiality to litigation without getting emotional or feeling a personal stake in the outcome. They also bring expertise to accurately track the lifecycle of e-discovery. During the FRCP 26(f) hearings with opposing counsel to develop the parameters of discovery, it can be very useful to have the opinion of the experts about the feasibility of deadlines and timelines.

When it comes to staffing e-discovery, there are no easy answers. Some organizations use a hybrid method, while a single organization may both outsource and manage e-discovery internally. For example, the Federal Trade Commission does both --while the FTC's Bureau of Competition manages e-discovery internally, its Bureau of Consumer Protection out-sources much of its e-discovery.

Regardless of the approach, there are several best practices that in-house counsel should institute. A strong project manager, whether an employee or a contractor, can help bring together the legal and IT perspectives, while keeping the project on task and on deadline.

Standardizing practices and workflows will save considerable time and create enormous efficiencies. And a repeatable process is a defensible process.

Communication and teamwork are also key elements of e-discovery. The earlier and more frequently the team meets, the less likely it will be that critical information is overlooked or a key potential custodian has been skipped.

As e-discovery costs continue to climb, organizations produce more and different data every day and litigation timelines compress, in-house counsel should consider the best e-discovery approach for their organizations before a major lawsuit hits. It's hard to think strategically, creatively and efficiently when drowning in data.

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